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Supreme Court
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IN THE

Supreme Court of the United States

OCTOBER 1951 TERM.

No. 814

ISIDORE ZAMORE, Trustee in Bankruptcy of MORAES CONSTRUCTION CO., INC., *et al.*,

Respondent,

—against—

J. HARRY GOLDBLATT and G. & G. HOLDING CORP.,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

GEORGE J. RUDNICK,
Attorney for Petitioners.

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INDEX.

SUBJECT MATTER.

	PAGE
Petition	1-9
Statement of the Matter Involved	1
Jurisdictional Statement	5
The Questions Presented	5
Reasons for the Allowance of the Writ	8
Brief	10-29
Opinions of the Courts Below	10
Jurisdiction	10
Statement of the Case	10
Specification of Errors	10
Point I. The Chattel Mortgage Having Been Filed Ten Months Prior to the Date of Bankruptcy, the Rights of the Mortgagee Were Superior to the Rights of the Trustee Under Section 70c of the Bankruptcy Act	12
Point II. The Trustee Could Set This Mortgage Aside Solely to the Extent of Creditors Antecedent to Filing of the Mortgage Who Saw Fit to File Claims in This Proceeding	14
Point III. The Trustee May Not Sell Chattels as to Which the Bankrupt Did Not Have Title at the Time of the Filing of the Petition in Bankruptcy, and the Bankruptcy Court Was Without Power to Question a Judgment Duly Rendered in a State Court Prior to Bankruptcy Adjudicating That Title Was in Appellant Goldblatt	19

PAGE

Point IV. The Trustee's Application to Sell Could Not be Determined in a Summary Proceeding, But Could Only be Determined in a Plenary Action 22

Point V. The Bankruptcy Court Was Not Authorized to Set Aside This Mortgage Against Three Mortgagors When Only One of the Mortgagors Was Bankrupt 28

Conclusion 29

CASES CITED.

American Trust & Savings Bank v. Ruppe, 237 Fed. 581 ..... 21, 24

Bailey v. Baker Ice Machine Co., 239 U. S. 268, 275-276.. 13

Chandler v. Perry, 74 F. 2nd 371 25

Clay v. Waters, 178 Fed. 385 25

Cline v. Kaplan, 323 U. S. 97 ..... 26, 27

First Natl. Bank v. Conway Road Estates Co., 94 F. 2d 736 26

Globe Bank v. Martin, 236 U. S. 288 16

Howard Johnson v. Tucker, 157 F. 2d 959, 962 19

In re Rothman, 183 Fed. 913 25

Karst v. Gane, 136 N. Y. 316 ..... 2, 16

Martin v. Commercial Nat. Bank, 245 U. S. 513 13

Matter of Jacoby, 138 F. 2nd 42 24

Matter of L. Rudnick & Co., 160 Fed. 903 21

Matter of Meiselman, 105 F. 2nd 995 26

PAGE

Matter of Superior Drop Forge & Mfg. Co., 208 Fed. 813.. 13
Matter of Wesley Corp., 18 F. Supp. 347, 352..... 20
Matter of Whitney, 113 F. 2d 426..... 26
Metcalf v. Barker, 187 U. S. 165..... 20
Moore v. Bay, 284 U. S. 4..... 8, 14, 15
Rader v. Star Mill & Elevator Co., 258 Fed. 599..... 21
Security Warehousing Co. v. Hand, 206 U. S. 415..... 19
Stephens v. Perrine, 143 N. Y. 476..... 2, 16
Taubel v. Fox, 264 U. S. 426..... 24
Tucker v. Siegel-Cooper, 194 N. Y. 442..... 2, 16

STATUTES CITED.

Bankruptcy Act, Sec. 47 (11 U. S. C. 47)..... 5
Bankruptcy Act, Sec. 67a..... 20, 27
Bankruptcy Act, Sec. 70a..... 19, 20
Bankruptcy Act, Sec. 70c..... 5, 13, 23, 26
Bankruptcy General Order No. 36..... 5
Judicial Code, Sec. 240(a) (28 U. S. C. 347)..... 5
New York Lien Law, Sec. 230..... 1, 5

TEXT BOOKS, ETC., CITED.

2 Collier on Bankruptcy, 14 Ed., pp. 463-4..... 25
Scott, The Meaning of the Provisions for Recordation (18 Va. L. Rev. 249, 265, 269)..... 15

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE FRED M. VINSON, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners, J. Harry Goldblatt and G. & G. Holding Corp., respectfully show to this Court:

STATEMENT OF THE MATTER INVOLVED.

On March 16, 1949 the bankrupt and two affiliated corporations executed a chattel mortgage to appellant Goldblatt for $120,000 on 43 items of personal property listed in the schedule attached thereto.

Section 230 of the New York Lien Law provides that:

> "Every mortgage * * * intended to operate as a mortgage of goods and chattels * * *, which is not accom-

panied by immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, is absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith and for a fair consideration, unless the mortgage, or a true copy thereof, is filed as directed in this article. * * *"

New York has held that this statute requires that the mortgage be filed within a reasonable time after execution and delivery, otherwise the mortgage is invalid as to existing creditors, and also as to creditors coming into existence between execution and filing, but the mortgage is valid as to creditors subsequent to the filing, no matter how unreasonable the delay in filing. (*Tucker* v. *Siegel-Cooper,* 194 N. Y. 442; *Karst* v. *Gane,* 136 N. Y. 316; *Stephens* v. *Perrine,* 143 N. Y. 476.)

On April 14, 1949 the said chattel mortgage was filed in the Queens County Register's Office.

The Courts below have held that the delay between execution on March 16, 1949 and filing on April 14, 1949 was not adequately explained or excused and, therefore, that the delay was unreasonable as against creditors antecedent to filing.

On November 3, 1949, after a default had occurred under the chattel mortgage, an action in the Supreme Court, Queens County, was commenced by appellant Goldblatt as plaintiff against the bankrupt as one of the defendants to replevin 30 of the 43 items listed in the chattel mortgage.

Such proceedings were thereafter had that on December 29, 1949, a judgment was duly entered in favor of appellant Goldblatt against the bankrupt adjudging that appellant Goldblatt recover from the bankrupt and retain *possession and title* of the 30 items of personal property specifically set forth in the judgment, which 30 items included among their number *all* of the chattels involved in the present appeal.

On February 23, 1950, an involuntary petition was filed against the bankrupt.

On April 18, 1950, the trustee was appointed.

On June 22, 1950, the trustee purported to take possession of the 11 items of personal property then located in a yard in Queens County, which 11 items are all the property directed to be sold by the order appealed from. These 11 items of personal property were part of the 30 items of personal property as to which the judgment in the Supreme Court, Queens County, entered December 29, 1949, *adjudicated that Goldblatt retain possession and title.*

By order to show cause, dated June 27, 1950, the trustee commenced this proceeding to sell the said 11 items of personal property free and clear of the chattel mortgage executed March 16, 1949 and filed April 14, 1949 on the ground that the said chattel mortgage was void as to the trustee because of the alleged unreasonable delay between its execution and filing.

Goldblatt's answer to the trustee's petition was a general denial, plus affirmative defenses [1] that the petition was insufficient; [2] that title to, and possession of, the chattels were in Goldblatt and his assignee (the co-appellant) by virtue of the December 1949 judgment above mentioned, which judgment was res judicata; [3] that the matter was required to be disposed of by plenary action; [4] that the trustee is a trespasser (fols. 25-32).

Appellant G. & G. Holding Corporation appeared specially and solely for the purpose of attacking the jurisdiction of the Court, its contention being that the matter should be disposed of by plenary action and not by summary proceedings (fols. 20-21).

At the hearing before the Referee, it appeared that the only creditors who antedated the filing of the chattel mortgage on April 14, 1949 were:

Todd: March 25, 1949 — for a typewriter ribbon (p. 134)	$ 3.82
Gertz: March 31, 1949—for some stationery (pp. 127-128)	$27.84
	$31.66

Gertz did not file its claim for $27.84 and the time for filing has long since expired.

There was also a Todd invoice, dated April 14, 1949 for $107.15 unpaid as of the date of the filing of the petition (p. 133) but the date of that invoice (Apri' 14, 1949) was the date on which the chattel mortgage was filed and, therefore, as to that sum of $107.15 Todd was not a creditor antecedent to the date of filing. Besides, the merchandise had been shipped from Rochester on April 13, 1949 (fol. 398) and the Court may take judicial notice that it would not have been received by the bankrupt until after the filing of the mortgage.

Therefore, the only creditor in this bankruptcy proceeding antecedent to the filing of the mortgage was one for $3.82. The Referee found that there was an actual consideration of $65,000 advanced by appellant Goldblatt to the bankrupt for the chattel mortgage (fol. 481), about $32,000 of which consideration went to pay various Federal and State taxes then owed by the bankrupt (fols. 100-103).

The Referee did *not* find either in his lengthy decision (pp. 145-146) or in his findings of fact and conclusions of law (pp. 157-168) that the bankrupt had title to the 11 chattels at the time of the filing of the petition.

The Referee overruled all the contentions of appellants and issued an order on July 9, 1951 (pp. 169-171) which authorized the trustee to sell the 11 chattels free and clear of the mortgage. The effect of this order was that (1) the mortgage, given for a valid consideration of at least $65,000, was declared *void in toto* on the petition of a trustee who represented an antecedent creditor for $3.82; (2) the trustee was authorized in this summary proceeding to sell chattels to which the bankrupt did *not* have title at the time of the filing of the petition.

On August 6, 1951 District Judge Inch dismissed appellants' petition to review and affirmed the order of the Referee (pp. 183-184).

On March 6, 1952 the Circuit Court of Appeals for the

Second Circuit affirmed the order of the District Court in a Per Curiam opinion.

On April 4, 1952 the order on mandate was filed in the District Court.

JURISDICTIONAL STATEMENT.

It is contended that this Court has the jurisdiction to review the order under the provisions of Section 47 of the Bankruptcy Act (11 U. S. C., Section 47); the provisions of Section 240(a) of the Judicial Code (28 U. S. C., Section 347) and Bankruptcy General Order No. 36.

THE QUESTIONS PRESENTED.

1. Assuming that there was an unreasonable delay in filing the chattel mortgage after its execution and delivery, was the trustee, who in his brief to the Circuit Court of Appeals stated that he was proceeding under Section 70c of the Bankruptcy Act and who was granted relief by the Circuit Court of Appeals under Section 70c of the Bankruptcy Act, authorized under the provisions of the said Section 70c to have the mortgage set aside?

The trustee argued in his brief before the Circuit Court of Appeals that the delay in filing of the chattel mortgage rendered it null and void as against a trustee in bankruptcy by virtue of the provisions of Section 70c of the Bankruptcy Act and Section 230 of the Lien Law.

The Circuit Court of Appeals stated in its Per Curiam opinion that:

> "It is argued by the appellants that the trustee could not attack the mortgage because he represented only one small creditor whose claim arose before the date of the filing, but one creditor who could attack it was enough to avoid the mortgage under Section 70(c) of the Bankruptcy Act, 11 U. S. C. A. § 110(c), against

later creditors represented by the trustee. Moore v. Bay, 284 U. S. 4; In re Sachs, 4th Cir., 30 F. 2d 510, 514, 515; City of New York v. Rassner, 2d Cir., 127 F. 2d 703, 707."

2. Assuming that the trustee was authorized to set the chattel mortgage aside, was the trustee entitled to have this mortgage set aside *in toto* or solely to the extent of the antecedent creditors whom he represented?

The mortgage was in the face amount of $120,000. The Referee in Bankruptcy found that there was a valid consideration of $65,000 advanced by appellant Goldblatt to the bankrupt for the chattel mortgage (fol. 481), about $32,000 of which went to pay various Federal and State taxes then owed by the bankrupt (fols. 100-103). The only creditor in this bankruptcy proceeding antecedent to the filing of the mortgage was one for $3.82.

3. Was the trustee entitled to an order authorizing him to sell chattels to which the bankrupt did *not* have title at the time of the filing of the petition in bankruptcy?

Nowhere in the decision or the findings of fact and conclusions of law of the Referee, or in the opinion of the Circuit Court of Appeals, is it stated that the bankrupt had title to the 11 chattels which were ordered sold. The judgment of the State court rendered December 29, 1949 (two months before the filing of the petition in bankruptcy) duly adjudged that Goldblatt recover from the bankrupt and retain possession and title to 30 items of personal property included in the chattel mortgage, which 30 items included among their number *all* of the chattels involved in this proceeding.

4. Did the Bankruptcy Court have jurisdiction to question a judgment duly rendered in a State court prior to bankruptcy adjudicating that title to the chattels involved was in appellant Goldblatt?

5. Did the Bankruptcy Court have jurisdiction to grant the trustee's application in a summary proceeding, rather than by plenary action?

6. Was the Bankruptcy Court authorized to set aside this mortgage against *three* mortgagors when *only one* of the mortgagors was bankrupt?

The chattel mortgage was made by three corporate mortgagors, all of whom were associated. The Referee found that Goldblatt advanced to the bankrupt as consideration for the mortgage the sum of $65,000; that Goldblatt advanced about $2,500 to the second mortgagor; that there is no proof that Goldblatt advanced any money to the third mortgagor (fols. 481-482).

The Circuit Court stated in its opinion that:

> "The chattel mortgage was executed on March 16, 1949, by Moraes Construction Co., Inc., and Morbar Construction Corp. and Moraes & Cavanagh, two corporations affiliated with Moraes Construction Co., Inc., under identical ownership and held to be departments of that company."

This alleged "holding" that the two mortgagors other than the bankrupt were "departments" of the bankrupt was made in two orders of the Referee, dated August 31, 1950, entered on consent of the president of the bankrupt and on the consent of the attorneys for the two companies, which orders directed (1) that the two corporations other than the bankrupt were agencies, divisions, and instrumentalities of the bankrupt; (2) that the assets and liabilities of the two associated corporations were assets and liabilities of the bankrupt; (3) that the trustee of the bankrupt be vested with title to the assets of the two associated corporations as of the date of the filing of the petition against the bankrupt on February 23, 1950. These orders were made *ex parte* without proof of any facts to support the directions made in the

order and without notice to Goldblatt, who held a lien by virtue of this mortgage on the property of the two associated corporations as well as on the property of the bankrupt. In fact, the Referee who made these orders recognized that the orders were *not* binding on these appellants and the orders were recognized by the Referee as *not* affecting the rights of these appellants (fols. 349-350).

REASONS FOR THE ALLOWANCE OF THE WRIT.

1. The Court below has decided several important questions of Federal law which have not been, but should be, settled by this Court.

2. Several of the Circuit Courts of Appeals have misinterpreted this Court's ruling in *Moore* v. *Bay* (284 U. S. 4) and clarification by this Court of its ruling is necessary in order to point out the limitations of that determination.

3. If the Circuit Court of Appeals has properly interpreted this Court's ruling in *Moore* v. *Bay* (*supra*), then a re-examination by this Court of its determination in that case is necessary because of the grossly inequitable result which stems from that determination, as pointed out in this case.

4. This case involves a serious question of the statutory interpretation of Section 70c of the Bankruptcy Act.

5. This case involves the jurisdiction of Federal courts over the judgments of State courts.

These reasons are discussed in petitioner's brief (pp. 10 to 12, *infra*).

WHEREFORE your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled in its Docket No. 22237 (No. 167—October Term, 1951), Isidore Zamore, Trustee in Bankruptcy of Moraes Construction Co., Inc., *et al.*, Appellee, against J. Harry Goldblatt and G. & G. Holding Corp., Appellants, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the order herein of the said Circuit Court of Appeals be reversed by this Court, and for such other, further, or different relief as to this Court may seem proper.

Dated, New York, May 15th, 1952.

GEORGE J. RUDNICK,
Counsel for Appellants.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinions of the Courts Below.

[SAME TITLE.]

The Referee's opinion appears at pages 145-156.

The Referee's findings of fact and conclusions of law appear at pages 157-168.

The Referee's order appears at pages 169-171.

There was no opinion by the District Court.

The order of the District Court appears at pages 182-184.

The opinion of the Circuit Court of Appeals is reported in 194 F. 2d 933.

Jurisdiction.

Reference is made to the jurisdictional statement in the petition (p. 5).

Statement of the Case.

Reference is made to the "statement of the matter involved" in the petition (pp. 1-5).

Specification of Errors.

1. The Circuit Court erred in holding that under Section 70c of the Bankruptcy Act the trustee, whose rights as a lien creditor *as of the date of the bankruptcy* under that section arose ten months *after* the filing of the chattel mortgage, could have this chattel mortgage declared void.

2. The Circuit Court erred in holding that under Section 70c of the Bankruptcy Court the trustee had the power to avoid the chattel mortgage solely because there was one small creditor antecedent to the filing of the chattel mortgage.

3. The Circuit Court erred in holding that the trustee could set aside this chattel mortgage *in toto.*

4. The Circuit Court erred in failing to hold that at most the trustee could set aside the chattel mortgage solely to the extent of the total of the antecedent creditors who filed claims in this bankruptcy proceeding, with distribution of the sum so recovered for the benefit of the estate to all the unsecured creditors.

5. The Circuit Court erred in holding that the trustee was empowered to sell these chattels for the benefit of the estate even though the bankrupt did not have title thereto at the time of the filing of the petition.

6. The Circuit Court erred in holding that the Bankruptcy Court had power to make a determination contrary to the adjudication made in a duly rendered State court judgment two months prior to the filing of the petition.

7. The Circuit Court erred in holding that the Bankruptcy Court had jurisdiction to grant the trustee's application to sell the chattels free and clear of the mortgage in this summary proceeding instead of in a plenary action.

8. The Circuit Court erred in holding that, even though only one of the mortgagors was bankrupt, the trustee was authorized to sell the chattels mortgaged to secure a debt owing by the three mortgagors.

Summary of Argument.

1. The chattel mortgage having been filed ten months prior to the date of bankruptcy, the rights of the mortgagee were superior to the rights of the trustee under Section 70c of the Bankruptcy Act.

2. The trustee could set this mortgage aside solely to the extent of creditors antecedent to the filing of the mortgage who saw fit to file claims in this proceeding.

3. The trustee may not sell chattels as to which the bankrupt did not have title at the time of the filing of the petition in bankruptcy, and the Bankruptcy Court was without power to question a judgment duly rendered in a State court prior to bankruptcy adjudicating that title was in appellant Goldblatt.

4. The trustee's application to sell could not be determined in a summary proceeding, but could only be determined in a plenary action.

5. The Bankruptcy Court was not authorized to set aside this mortgage against three mortgagors when only one of the mortgagors was bankrupt.

POINT I.

THE CHATTEL MORTGAGE HAVING BEEN FILED TEN MONTHS PRIOR TO THE DATE OF BANKRUPTCY, THE RIGHTS OF THE MORTGAGEE WERE SUPERIOR TO THE RIGHTS OF THE TRUSTEE UNDER SECTION 70c OF THE BANKRUPTCY ACT.

The trustee stated in two separate places in his brief to the Circuit Court of Appeals that he was basing his right to sell the chattels involved in this proceeding, free and clear of the mortgage, *solely* on the power granted to him under Section 70c of the Bankruptcy Act. The Circuit Court of Appeals likewise based its determination on the right of the trustee to avoid this mortgage solely under Section 70c of the Bankruptcy Act. The mortgage was executed and delivered on March 16, 1949. It was filed on April 14, 1949. The involuntary petition in bankruptcy was filed on February 23, 1950.

Section 70c, as amended on March 18, 1950, puts the trustee in the position occupied under the State law by a creditor holding a lien through legal or equitable proceedings. But Section 70c confines the rights which it confers to those which a lien creditor would have *on the date of bankruptcy.* Section 70c specifies that the trustee's lien is deemed vested as of the date when the petition in bankruptcy is filed with respect to all property within the scope of its terms. This Court has determined that liens properly perfected *prior* to the date of bankruptcy will be superior to that of the trustee under what is now Section 70c. If properly recorded prior to bankruptcy, even though not immediately upon the date the transaction was effected, the cases hold that a chattel mortgage will prevail against the trustee under what is now Section 70c. (*Bailey* v. *Baker Ice Machine Co.,* 239 U. S. 268, 275-276; *Martin* v. *Commercial Nat. Bank,* 245 U. S. 513.) Mere delay by one who is required to record a transaction does not give the trustee, as a lien creditor, a position superior to creditors who, although late, nevertheless file or otherwise perfect their mortgage prior to bankruptcy. (*Matter of Superior Drop Forge & Mfg. Co.,* 208 Fed. 813.)

Since the mortgage in the instant case was concededly recorded ten months before the filing of the petition, and since the mortgage is concededly good, even though filed late, as against creditors subsequent to the date of filing, and since under Section 70c the trustee's rights are measured by the rights of a lien creditor only as of the date of bankruptcy, the Courts below were without power to adjudge that the trustee's rights were superior to those of the chattel mortgagee.

POINT II.

THE TRUSTEE COULD SET THIS MORTGAGE ASIDE SOLELY TO THE EXTENT OF CREDITORS ANTECEDENT TO FILING OF THE MORTGAGE WHO SAW FIT TO FILE CLAIMS IN THIS PROCEEDING.

In *Moore* v. *Bay* (284 U. S. 4) a chattel mortgage was not filed in accordance with California law. There a California statute provided that unless a notice of the chattel mortgage were recorded seven days before the consummation of the mortgage, the chattel mortgage would be "conclusively presumed to be fraudulent and void as against the existing creditors." (In the case at bar the New York statute does *not* provide that the mortgage is *fraudulent* because of a delay in filing.) The mortgage in the *Moore* case was concededly bad as against creditors existing on the date of the execution of the mortgage and those who became such between execution and filing. The question was whether the mortgage was also void as against creditors arising after the filing. The Circuit Court of Appeals had held that the chattel mortgagee was entitled to priority over creditors subsequent to the date of the filing of the mortgage and that only creditors antecedent to the filing were entitled in distribution to priority over the mortgagee. (See opinion of the Circuit Court of Appeals, 45 F. 2d 449, at p. 450.) The Supreme Court reversed and held that the rights of the trustee are to be enforced for the benefit of the entire bankruptcy estate and that the Bankruptcy Act required that the trustee's recovery for the benefit of the estate is to be distributed equally on all allowed claims except such as have priority or are secured.

The language of the Supreme Court opinion can mean only one thing—that, whatever the measure of recovery by the trustee is, the recovery should be distributed equally to all creditors (whether prior to or subsequent to the filing of the mortgage). But the Court did *not* hold or intend to hold what the measure of recovery should be. The measure of

recovery, *i.e.*, to what extent the chattel mortgage should be avoided, still remained the same *after* the Supreme Court determination as it was *before*, to wit, the chattel mortgage should be avoided only to the extent of the amount of the creditors who were entitled to set it aside under State Law, *i.e.*, the creditors existing up to the time of filing of the chattel mortgage; but when the mortgage was then set aside to that extent, the trustee was required to distribute that sum so recovered to all the creditors regardless of whether or not the creditors came into existence before or after the filing. That this is the true meaning of *Moore* v. *Bay* (*supra*), is apparent from Scott, The Meaning of the Provisions for Recordation (18 Va. L. Rev. 249, 265, 269).

If *Moore* v. *Bay* (*supra*) is not interpreted in this way, it leads to a most unjust result in the case at bar. Here three corporations made a chattel mortgage to appellant Goldblatt for $120,000. The trustee concedes that there was a sufficient consideration for the making of the mortgage. The Referee found that of the $120,000 consideration for the mortgage, the bankrupt corporation actually received about $65,000 (fol. 481). The situation presented by the trustee's application then is one where the bankrupt had antecedent creditors for $31.66—in this bankruptcy proceeding, the only antecedent creditor is one for $3.82 (the $27.84 creditor not having filed a claim)—and the trustee, solely as the representative of that creditor contends that he has the right to set aside a mortgage for $120,000 and to sell chattels free and clear of that mortgage. If a bankruptcy court is an equity court and if the trustee's position is an equitable one, there is something wrong with the law. The Supreme Court by its decision in *Moore* v. *Bay* (*supra*), certainly could not have intended a result as inequitable and as harsh as this. If the opinion in that case is properly read, it cannot support the trustee's unconscionable position.

That this Court could not have intended by its determination in *Moore* v. *Bay* (*supra*) any other result than that contended for by these petitioners is clear from these considerations:

(1) The opinion refers to the rights of the trustee as those arising "by subrogation." By this expression the Court could have meant only that the trustee sues as the representative of the creditors who could attack the mortgage, and not in the trustee's own right. Therefore, the trustee's right of recovery should be measured by the rights of creditors as to whom the mortgage was invalid, *i.e.*, only to the extent of the total sum of the creditors who could attack the mortgage, even though the sum recovered must go to *all* the creditors because the trustee's recovery is by statute "for the benefit of the estate."

The power of the trustee to enforce rights "by subrogation" should give him the power to enforce these rights to no greater extent than those creditors whom he represents by subrogation could have done under State law had bankruptcy not intervened. Under New York law the trustee in bankruptcy could not have set this mortgage aside except to the extent of creditors existing before the filing. (*Tucker* v. *Siegel-Cooper,* 194 N. Y. 442; *Karst* v. *Gane,* 136 N. Y. 316; *Stephens* v. *Perrine,* 143 N. Y. 476.) Thus, where a conveyance, as in the case at bar, is void only as to a class of creditors, the trustee's recovery should not exceed the claims of this class. (*Globe Bank* v. *Martin,* 236 U. S. 288.)

(2) This Court cited *Globe Bank* v. *Martin* (236 U. S. 288) twice in the short opinion in *Moore* v. *Bay* (*supra*). In the *Globe Bank* case the trustee in bankruptcy brought suit praying for a judgment declaring a certain conveyance fraudulent as to all creditors, both antecedent and subsequent to the conveyance. The Court adjudged that the conveyance was fraudulent only as to antecedent creditors. The trustee recovered a judgment declaring that the conveyance should be set aside solely to the extent sufficient to realize the amount of creditors' debts existing at the time of the conveyance. This Court held that the sum so recovered should be distributed equally to all creditors (both antecedent and

subsequent to the conveyance), even though the conveyance was not voidable as to creditors whose debts were created after the delivery of the deed.

The result reached in that case is exactly the result which petitioners contend should prevail in the case at bar. The chattel mortgage should be set aside solely to the extent necessary to realize the amount of creditors' debts existing prior to the filing of the chattel mortgage, but the sum so recovered should be distributed equally to all creditors of the estate.

(3) In *Moore* v. *Bay* (*supra*) the California statute involved conclusively presumed the chattel mortgage fraudulent. There is no similar provision in the New York statute. There is no provision in the New York statute that a delay in the filing of the mortgage renders the mortgage fraudulent. There was no finding by the Courts below that there was any fraud involved. In fact, the Courts below found that the mortgage, if not for the delay in filing, was not only bona fide, but given for a valid and substantial consideration. In the absence of fraud, the mortgagee's rights should be considered and protected insofar as State law does not invalidate the mortgage.

(4) As already pointed out, any result other than the one contended for by petitioners would be extremely harsh. The complete stripping of the mortgagee is inequitable and the only just result is to give the trustee no more than the creditors who were entitled to avoidance could have received. That sum, of course, would have to be distributed among all general creditors according to the provisions of the Act. The provisions of the Bankruptcy Act that "all property of the debtor" affected by the mortgage remains part of his estate, released from the mortgage, and shall pass to the trustee for the benefit of the estate mean only that so much of the property of the debtor as may be avoided passes to the trustee. It certainly does not mean that all of the property of the

debtor passes to the trustee when only part of the transfer can be avoided.

It should also be considered that, if the bankrupt had paid the insignificant claims of the antecedent creditors with part of the money advanced by Goldblatt, the trustee would not have the power to set aside this mortgage to any extent. These petitioners should not be made to suffer the great loss which results from the determination sought to be reviewed because of the happenstance that the bankrupt may have overlooked these small payments.

No hardship results to the creditors in the case at bar by the position of the petitioners. Here $32,000 of the $65,000 consideration for the mortgage went to pay Federal and State taxes. If Goldblatt had not advanced this money, the Federal and State taxes would have been unpaid. These Governmental authorities would then have prior claims on the assets and the other creditors would receive nothing. There is no reason why Goldblatt should not at least be subrogated to the rights of the Federal and State authorities, who have been paid with his money, and be considered prior in lien to the other creditors.

Petitioners respectfully request that this Court clarify its determination in *Moore* v. *Bay* (*supra*) so that the interpretation of the case as contended by petitioners will be upheld. On the other hand, if *Moore* v. *Bay* means what the trustee says it means, then petitioners respectfully request this Court to re-examine the doctrine of *Moore* v. *Bay* in view of the harsh and inequitable results following therefrom which may have been overlooked by the Court at that time and which have come to pass in the case at bar.

POINT III.

THE TRUSTEE MAY NOT SELL CHATTELS AS TO WHICH THE BANKRUPT DID NOT HAVE TITLE AT THE TIME OF THE FILING OF THE PETITION IN BANKRUPTCY, AND THE BANKRUPTCY COURT WAS WITHOUT POWER TO QUESTION A JUDGMENT DULY RENDERED IN A STATE COURT PRIOR TO BANKRUPTCY ADJUDICATING THAT TITLE WAS IN APPELLANT GOLDBLATT.

The Referee noted that the State court judgment of December 29, 1949 was rendered within four months prior to the filing of the petition in bankruptcy (fol. 464) and held (a) that the judgment was not res judicata as to the trustee because rights of creditors could not be determined in the replevin action; (b) that, if the chattel mortgage were void as to the trustee by reason of the delay in filing, the judgment could not validate the mortgage as to the trustee; and (c) that the trustee was not a party to the replevin action because he was not even in existence at the time of the judgment (fols. 465-466).

It is respectfully submitted that none of these conclusions is in accordance with established law.

(A) Section 70a of the Bankruptcy Act provides that the trustee is vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy. In *Security Warehousing Co.* v. *Hand* (206 U. S. 415), the Supreme Court held that the trustee stands in the shoes of the bankrupt and has no better title than the bankrupt had at the time of the filing of the petition. Stated in another way, the trustee can own nothing but what the bankrupt owned at the time of the adjudication. (*Howard Johnson* v. *Tucker*, 157 F. 2d 959, 962.)

That the judgment of December 29, 1949 in the New York Supreme Court, Queens County, in which appellant Goldblatt and the bankrupt were adversary parties, divested the

bankrupt of title and possession to the 11 chattels involved in this appeal is not disputed. However, the trustee contended, and the Referee found, that the judgment is not res judicata as to him because neither the trustee nor the creditors were parties to the action and their rights could not be determined in the action (fol. 495). That this argument is fallacious is apparent from the fact that the judgment was rendered two months *before* the filing of the petition and, therefore, the trustee could not possibly have been made a party. Furthermore, the creditors were neither necessary nor proper parties in the replevin action. By the principle of res judicata, the judgment is binding on the bankrupt and his privies or successors in interest. By the provisions of Section 70a of the Bankruptcy Act, the trustee occupies no better position than the bankrupt. Even though rendered within four months before bankruptcy, the judgments of State courts having jurisdiction of the parties and the subject matter are entitled to full faith and credit in national courts of bankruptcy and are res judicata. (*Matter of Wesley Corp.*, 18 F. Supp. 347, 352.) The binding effect of a judgment is never nullified by the bankruptcy statute (*Id.*). The trustee was bound by the adjudication of title in appellant Goldblatt by the December 29, 1949 judgment and the Bankruptcy Court was without power to authorize the trustee to sell chattels to which the bankrupt did not have title at the time of the filing of the petition.

(B) The fact that the State court judgment was entered within four months prior to the filing of the petition in bankruptcy is meaningless. It is only a judgment *creating* a lien within the four months period which is nullified by Section 67a of the Bankruptcy Act (*Metcalf* v. *Barker*, 187 U. S. 165), provided the other conditions mentioned in that subdivision are present. (It may be stated parenthetically that in this case there was no proof that the bankrupt was insolvent at the time the judgment was entered.) But the judgment of December 29, 1949 did *not* create a lien and, there-

fore, did not come within the provisions of that section. A plaintiff in a replevin action seeks to reclaim *his* property, not to attach a lien on defendant's property. The Bankruptcy Act does not require that the property of third parties, found in the possession of the bankrupt, be turned over to the trustee as part of the bankrupt's estate. A judgment in a replevin action, even though rendered within four months prior to bankruptcy, does not come within, and is not invalidated by, the provisions of Section 67a of the Bankruptcy Act and that status of the replevin action is not affected by the fact that the defendant in the replevin action subsequently becomes a bankrupt. (*Matter of L. Rudnick & Co.*, 160 Fed. 903, C. C. A. 2. See also, *American Trust & Savings Bank* v. *Ruppe,* 237 Fed. 581, C. C. A. 8.)

(C) The Referee held that, if the chattel mortgage made 11 months prior to the filing of the petition was void, the judgment of December 1949 could not validate this mortgage as to the trustee (fol 465). It is respectfully submitted that that is not a correct statement of the law.

Rader v. *Star Mill & Elevator Co.* (258 Fed. 599, C. C. A. 8) presented a situation identical with the one at bar. There plaintiff claimed a vendor's lien for unpaid purchase money. He brought an action for foreclosure of the lien and obtained judgment. Two months after the judgment a petition in bankruptcy was filed against the defendant in the foreclosure action. In the bankruptcy proceeding the trustee argued that the vendor's lien was invalid. The Circuit Court of Appeals rejected the trustee's contention because the Bankruptcy Court was without power to adjudicate the invalidity of the lien. The Circuit Court held [1] that the objections to the vendor's lien rested on acts or omissions prior to the State court decree, which adjudicated that the lien claimed was valid; [2] that the objections of the trustee could not be heard because the judgment rendered in the State court action estopped the bankrupt, the trustee, and the general creditors he represented, who stood in the shoes of the bank-

rupt, from asserting or maintaining that the vendor's lien was invalid; [3] that the trustee took his interest in the property subject to the decree against the bankrupt, and that the trustee had no rights or equities against the lienor superior to those which the bankrupt had when the petition in bankruptcy was filed, which was about two months after the final decree of foreclosure; [4] that the vendor's lien was not obtained through legal proceedings and consequently was not defeated by the Bankruptcy Law, even though the final decree was rendered within four months preceding the filing of the petition in bankruptcy; [5] that the trustee and the unsecured creditors he represented were, therefore, entitled to no relief against the decree of the Court sustaining the vendor's lien.

The same result must obtain in the case at bar. Here the judgment in the replevin action necessarily adjudicated that the chattel mortgage was a valid lien. The trustee took subject to the judgment in the replevin action against the bankrupt. The trustee had no rights against appellant superior to those which the bankrupt had when the petition in bankruptcy was filed.

POINT IV.

THE TRUSTEE'S APPLICATION TO SELL COULD NOT BE DETERMINED IN A SUMMARY PROCEEDING, BUT COULD ONLY BE DETERMINED IN A PLENARY ACTION.

The Referee held that the Bankruptcy Court had jurisdiction to determine by summary order the application of the trustee to sell because the trustee had actual possession of the 11 chattels (476).

The Circuit Court held that summary proceeding was warranted because there was substantial evidence that the 11 chattels here involved remained in the possession of the bankrupt at all times until the trustee took possession of

them and that being so, the Bankruptcy Court had summary jurisdiction over the property.

It is respectfully submitted that the Court overlooked the facts that (1) the Bankruptcy Court was without power to hold that the bankrupt had title to the property at the time of the filing of the petition and, therefore, the Bankruptcy Court had no summary jurisdiction to determine the adverse claims of title; (2) assuming that the bankrupt had possession of the property at the time of the filing of the petition, that possession was wrongful because the State court judgment rendered two months before the filing of the petition adjudicated that Goldblatt recover and retain title and possession to the chattels here involved; if the bankrupt's possession was wrongful, the trustee's possession was wrongful and a summary proceeding is not available where the possession of the Bankruptcy Court is wrongful.

It is respectfully submitted that the determination of the Courts below was erroneous for several reasons:

(A) The Bankruptcy Court has jurisdiction to proceed summarily to determine adverse claims of title, only where the court has power to hold that the bankrupt had title to the property at the time of the filing of the petition. As pointed out *supra*, the bankrupt did not have title to the property involved at the time of the filing of the petition because a judgment duly entered against the bankrupt two months prior to the filing of the petition had determined that question against the bankrupt. In the face of that judgment, by which the Bankruptcy Court was bound, the Bankruptcy Court was without power to act summarily in this proceeding because the Bankruptcy Court was without power to determine that the bankrupt had title.

The trustee contended that his rights in this proceeding are based on Section 70c of the Act, as amended on March 18, 1950. That section does not give the trustee any rights either in its old or new form. Even before the amendment it was held that the property referred to in Section 70c in-

cludes only property of the bankrupt, the title to which is vested in the trustee by the provisions of Section 70a; that Section 70c cannot refer to property belonging to a third party. (*Matter of Jacoby*, 138 F. 2d 42, C. C. A. 3.) The language of present Section 70c makes it clear beyond doubt that it is only property "of the bankrupt at the date of the bankruptcy" with respect to which the trustee is given the rights of a lien creditor. The judgment of December 29, 1949 expressly adjudicated that the bankrupt did not have title or possession to the 11 chattels involved in this proceeding. Since these chattels were *not* property of the bankrupt at the date of the bankruptcy on February 23, 1950, Section 70c does not give the trustee any rights with respect thereto.

(B) In any event, the Bankruptcy Court may proceed by summary order only where a trustee has *rightful* possession, and not where, as in the case at bar, the possession of the trustee is wrongful. (*Taubel, etc., Co.* v. *Fox*, 264 U. S. 426.) A Bankruptcy Court has no jurisdiction or authority, in the absence of lawful possession of the property by its officers, to determine in a summary proceeding an adverse claim of title. (*American Trust & Savings Bank* v. *Ruppe, supra.*)

It is not disputed that on December 29, 1949, a judgment duly entered in the Supreme Court, Queens County, in an action between appellant Goldblatt and the bankrupt, adjudicated that Goldblatt recover from the bankrupt and retain *possession and title* of each of the 11 items of personal property involved in the trustee's application, as well as 19 other items not involved in the trustee's application. After entry of that judgment, the bankrupt no longer had legal possession or title and, therefore, could not have given either possession or title to the trustee in bankruptcy. The trustee can have no greater rights to possession or title than the bankrupt had, unless in a plenary action it is adjudicated otherwise. This trustee and his attorney, by exercising the slightest dominion over this property with knowledge of the rights of these appellants as adjudicated in a duly entered

judgment, are guilty of conversion. The trustee's right of possession in the case at bar is no greater than that of a trespasser. It is respectfully submitted that wrongful possession by a trustee does not constitute possession of a Bankruptcy Court which is a condition precedent to the exercise of summary jurisdiction where there are adverse claims of title.

Within the meaning of the rule that a Bankruptcy Court has summary jurisdiction only where the Bankruptcy Court has possession, the possession of the Bankruptcy Court must be rightful; if it is shown that property held by the court or the trustee has not been rightfully taken, the court will order its surrender. (2 Collier on Bankruptcy, 14th Ed. pp. 463-464.) To come within the rule, the property claimed by the trustee must have been lawfully reduced to actual possession. (*Clay* v. *Waters*, 178 Fed. 385, C. C. A.; *In re Rothman*, 183 Fed. 913, 922, C. C. A.) Or, as stated in *Chandler* v. *Perry* (74 F. 2d 371, 373, C. C. A.):

> "* * * a trustee or receiver in bankruptcy who ought to have brought a plenary suit to recover possession of property adversely held could not seize possession and then cite the claimant to a summary trial of his title. If an objecting claimant should show that the court in fact had not possession or had wrongfully gotten it, the court should not proceed. So if on preliminary inquiry if it should clearly appear that the bankrupt had no title to or interest in the property, the court ought to surrender it."

In the case at bar there was a duly entered judgment in the State court expressly adjudicating that both title and possession were no longer in the bankrupt but in appellant Goldblatt. That judgment entered by a court having jurisdiction of the parties and subject matter is entitled to full faith and credit and is res judicata.

The rule is that, where the controversy is one involving property in the actual or constructive possession of a third

person asserting a bona fide adverse claim, the Bankruptcy Court has no jurisdiction to determine summarily that person's claim upon petition by the trustee. (*Cline* v. *Kaplan*, 323 U. S. 97.) Or, as stated in *Matter of Meiselman* (105 F. 2d 995): "It is now settled that if there is a real and substantial controversy of law or fact as to property held adversely to a bankrupt—'a contested matter of right, involving some fair doubt and reasonable room for controversy'—the bankruptcy court is 'without jurisdiction' to adjudicate the matter, but the trustee must have resort to a plenary suit."

The Bankruptcy Court does not have jurisdiction to determine an adverse claim to property in a summary proceeding against the objection of the claimant when the bankrupt has neither the legal title nor possession. (*First Natl. Bank* v. *Conway Road Estates Co.*, 94 F. 2d 736, cert. den. 304 U. S. 578.)

Section 70c of the Bankruptcy Act (under which the trustee claims he is proceeding) does not enable the trustee to treat property adversely held as in the constructive possession of the Bankruptcy Court and hence within that court's summary jurisdiction. (*Matter of Whitney*, 113 F. 2d 426.)

In this case appellant Goldblatt was duly adjudicated to have *title and possession* to the 11 chattels here involved as against the bankrupt on December 29, 1949 by the judgment entered in the Supreme Court, Queens County. That adjudication gave actual and constructive possession of the chattels involved in this appeal to appellant Goldblatt, gave him the basis for a bona fide adverse claim to the said chattels, gave that appellant a title which was more than merely colorable, and gave Goldblatt's assignee (appellant G. & G. Holding Corp.) the same rights. Under these circumstances, the authorities universally hold that the Bankruptcy Court is ousted of summary jurisdiction and the trustee must resort to a plenary action.

The only instrument being attacked in this summary proceeding is the chattel mortgage executed March 16, 1949 and

filed April 14, 1949. It may be that the Bankruptcy Court has summary jurisdiction to hear and determine rights of parties under a chattel mortgage where the mortgage against the property of the bankrupt is made and filed within four months of the petition regardless of possession (67 subds. a 1 and a 4 of the Bankruptcy Act). But this mortgage was *executed and filed approximately a year before the filing of the petition.* Under these circumstances, the Bankruptcy Court does not have summary jurisdiction without rightful possession of the property. Possession was not here rightfully obtained because it was in direct violation of the express adjudication of a duly entered judgment. It is respectfully submitted that the bankrupt had no title or interest in the property at the time of the filing of the petition; that, therefore, neither the trustee nor the Bankruptcy Court could get lawful possession of the property; and that the petition in this summary proceeding should have been dismissed. Appellant Goldblatt pleaded in his answer that the rights of the trustee should be disposed of by plenary action (30). The co-appellant G. & G. Holding Corp. made a similar plea (20-21). The motion to dismiss the petition was based in part on the ground that a plenary action was required (336; 353). In the petition to review the order of the Referee, one of the errors claimed was that the Referee failed to hold that summary proceedings were not maintainable (522). Thus both appellants pleaded their claims at the outset and both made formal protest to the exercise of summary jurisdiction by the Bankruptcy Court before that court made its final order. Consent by appellants to summary jurisdiction was thereby negatived and any suggestion by the trustee that appellants conferred consent by participating in the hearing on the merits should be rejected. Consent is not given even though a claimant participates in the proceedings where formal objection to summary jurisdiction is made before entry of the final order. (*Cline* v. *Kaplan,* 323 U. S. 97.)

POINT V.

THE BANKRUPTCY COURT WAS NOT AUTHORIZED TO SET ASIDE THIS MORTGAGE AGAINST THREE MORTGAGORS WHEN ONLY ONE OF THE MORTGAGORS WAS BANKRUPT.

The chattel mortgage in question was made by three mortgagors jointly. This was *not* a mortgage in which the property of one mortgagor was pledged as security solely for the advances to that mortgagor. In this case *all* the property listed in the schedule annexed to the mortgage, regardless of which mortgagor owned the property, was pledged as security for the total indebtedness to the mortgagee.

The Referee found that at least $65,000 was advanced by appellant Goldblatt to the mortgagors, of which about $2,500 was paid to Moraes & Cavanagh, Inc., which is not the plaintiff corporation (481-482). But *each* of the three mortgagors was liable to the mortgagee for the repayment of the *entire* indebtedness. *All* of the property listed in the schedule annexed to the mortgage, which included the 11 chattels involved in this proceeding, was pledged to the mortgagee as security for the repayment by the three mortgagors of the $65,000. The mortgage as against Moraes & Cavanagh, Inc. and the Morbar Construction Corp. is valid. No one has attacked the mortgage as against those two mortgagors either in this proceeding or in any other action or proceeding.

Since the chattels involved in this proceeding had been pledged as security for the entire $65,000 indebtedness, for which indebtedness each of the two mortgagors other than the bankrupt is liable, by a mortgage which is valid as against both Moraes & Cavanagh, Inc. and Morbar Construction Corp., the Referee in this bankruptcy proceeding was without power to direct that these chattels be taken out of that mortgage and sold free and clear of a mortgage which remains valid against Moraes & Cavanagh, Inc. and Morbar Construction Corp. — even assuming (without conceding) that the mortgage was invalid as against this trustee.

This contention was argued before the Referee as part of the motion to dismiss (141-153; 344-350) and was also assigned as error in the petition to review (524-526). The two ex parte orders made by the Referee on August 31, 1950 declaring that the property of the other two mortgagors is the property of the bankrupt (486) are not binding on these appellants and were recognized by the Referee as not affecting the rights of these appellants (349-350). The orders were made without notice to these appellants and without proof of any facts to support the findings made in the orders. In any event, these orders do not destroy the force of the argument made under this point.

CONCLUSION.

For the reasons stated in the petition and in this brief, it is respectfully submitted that the application for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE J. RUDNICK,
Attorney for Petitioners.

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Office - Supreme Court,
FILED
JUN 3 1952
CHARLES ELMORE CRO
CL

IN THE

Supreme Court of the United States

OCTOBER 1951 TERM.

No. 814

ISIDORE ZAMORE, Trustee in Bankruptcy of MORAES CONSTRUCTION CO., INC., *et al.*,

Respondent,

—against—

J. HARRY GOLDBLATT and G. & G. HOLDING CORP.,

Petitioners.

BRIEF OF TRUSTEE IN BANKRUPTCY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The petitioners seek to review the unanimous decision of the U. S. Court of Appeals for the Second Circuit, 194 F. 2d 933, affirming the order of the U. S. District Court for the Eastern District of New York, which affirmed the order of the Referee in Bankruptcy, dated July 9, 1951, granting the motion of the trustee to sell eleven chattels free and clear of the mortgage and adjudging that the chattel mortgage made by Moraes Construction Co., Inc., Morbar Construction Corp. and Moraes and Cavanaugh, Inc. to J. Harry Goldblatt, to be null and void as against Isidore Zamore, as trustee in bankruptcy and the creditors of the estate, as to the eleven chattels in the trustee's possession, and overruling, denying and dismissing the special appearance of G. & G. Holding Corp.

STATEMENT.

On June 24, 1950, Isidore Zamore, as trustee herein, moved before the Referee in Bankruptcy for an order authorizing the trustee to sell the chattels in the trustee's possession and claimed to be subject to a mortgage made by Moraes Construction Co., Inc., Morbar Construction Corp. and Moraes and Cavanaugh, Inc. to J. Harry Goldblatt, dated March 16, 1949 and filed in the office of the Register of Queens County on April 14, 1949, free and clear of the mortgage, and further for an order adjudging and decreeing the chattel mortgage to be null and void as against the trustee and the creditors of this estate.

J. Harry Goldblatt, by his answer filed July 11, 1950, appeared generally, denying the allegations of the trustee's petition and asserted various affirmative defenses (fols. 25-31). G. & G. Holding Corp. appeared specially, objecting to the jurisdiction of the Court (fols. 19-21). By stipulation entered upon the record at the hearings, the parties agreed and consented that the name of "Hero Excavating Corporation," set forth as one of the parties respondent in the order to show cause, be eliminated and that there be substituted in place thereof, G. & G. Holding Corp., the intended and actual respondent (fols. 39-40).

Hearings upon the issues were had before the Referee on August 3, October 5, October 25 and November 28, 1950.

Thereafter a decision was rendered by the Referee in Bankruptcy, dated June 18, 1951, adjudging the chattel mortgage to be null and void as against the trustee and the creditors, authorizing the trustee to sell the chattels in his possession free and clear of the mortgage and overruling, and dismissing the special appearance of G. & G. Holding Corp. (fols. 433-468).

Findings of fact and conclusions of law were made by the Referee on July 9, 1951 (fols. 469-503). The order of the Referee on his opinion and findings of fact and conclusions of law were entered on July 9, 1951 (fols. 505-511).

Upon review to the District Court, Chief Judge Robert A. Inch, in a memorandum decision (fol. 545), affirmed the decision and order of the Referee, upon which an order was entered on August 6, 1951 (fols. 546-552).

On appeal, the U. S. Court of Appeals unanimously affirmed the decision and order of the District Court and the Referee.

The writ should not be allowed, firstly because there is no conflict in decisions and, secondly because the decision of the Court of Appeals as to summary jurisdiction, as to the judgment in favor of Goldblatt in the New York State Court action not being res judicata as against the trustee, and as to the delay in the filing of the mortgage rendering it void as against the trustee and creditors, is in accord with the prior decisions in this Circuit, other Circuits and ordinary Rules of Law.

QUESTIONS INVOLVED.

The issues presented to and determined by the Referee in Bankruptcy, the Circuit Court and the Court of Appeals, were: "Did the Bankruptcy Court have summary jurisdiction to adjudge the chattel mortgage to be null and void and, if so, is the mortgage null and void in its entirety?"

POINT I.

THE BANKRUPTCY COURT HAD SUMMARY JURISDICTION TO ADJUDGE THE CHATTEL MORTGAGE NULL AND VOID IN ITS ENTIRETY.

A. Summary Jurisdiction.

The Referee, the District Court and the Circuit Court of Appeals have all held that the Bankruptcy Court had summary jurisdiction to adjudge the chattel mortgage null and void and that the chattel mortgage is null and void in its entirety as against the trustee in bankruptcy herein and the creditors of this estate.

These findings are based upon the following facts:

On March 16, 1949, Moraes Construction Co., Inc., Morbar Construction Corp. and Moraes and Cavanaugh, Inc. executed and delivered to J. Harry Goldblatt a chattel mortgage covering forty-three items of machinery and equipment which was filed in the office of the Register of Queens County on April 14, 1949 (fols. 44, 473, Exhibit I, fols. 361-390).

On February 23, 1950, the date of the filing of petition of bankruptcy herein, and at all times prior thereto, the eleven chattels as set forth in Trustee's Exhibit II (fols. 394-396) and covered by the chattel mortgage, were and remained in the physical possession and control of the bankrupt, Moraes Construction Co., Inc., until the trustee in bankruptcy took physical possession and control of the same on June 22, 1950 and remained in the possession and control of the same since (fols. 440-441, 474-476, 485).

The eleven chattels were never in the possession and control of J. Harry Goldblatt or G. & G. Holding Corp. (fols. 441-476). Between March 16, 1949, the date of the execution of the mortgage, and April 14, 1949, the date of its filing, claims of creditors, to wit, Todd Co., Inc. and B. Gertz, Inc., came into existence, which remained unpaid and owing at the date of the filing of the petition in bankruptcy herein (fols. 441-442, 462, 480, 397-402, 403-420, Exhibits III and IV).

The alleged explanation for the reason for the delay of twenty-nine days in the filing of the mortgage for the purpose of verifying and checking the items of machinery and equipment covered by the mortgage was found by the Referee to be no satisfactory explanation, nor an excuse, nor a justification for the unreasonable and unwarranted delay of twenty-nine days in the filing of the mortgage, particularly as only forty-three items of machinery and equipment were set forth in the schedule and the only change made in the schedule between the date of the execution of the mortgage on March 16, 1949 and the date of its filing, was the inclusion of serial numbers as to only two items (fols. 459-461, 477-479).

Although proceedings had been instituted by J. Harry Goldblatt against the bankrupt to replevin the property subject to the mortgage and the order of the Supreme Court, Queens County, wherein a judgment was obtained on December 29, 1949, within four months of the filing of the petition, the judgment was not res judicata, nor binding upon the trustee, nor the creditors of the estate, inasmuch as Morbar Construction Corp. and Moraes and Cavanaugh, Inc., two of the mortgagors, were not parties to the replevin action, nor were the creditors of the mortgagor, nor the trustee in bankruptcy, made parties to said suit (fols. 443-444, 464, 465, 483-484, 488-495).

On August 31, 1950, two orders were made and entered by the Referee, one of which provides that the property, assets and effects and liabilities of Morbar Construction Corp. are the property, assets and effects of Moraes Construction Co., Inc., and the other provides that the property, assets and effects and liabilities of Moraes and Cavanaugh, Inc. are the property, assets and effects of Moraes Construction Co., Inc., and vested title to Morbar Construction Corp. and Moraes and Cavanaugh, Inc. in the trustee of Moraes Construction Co., Inc.

Here, the property in question, the eleven chattels, were concededly and at all times prior to the filing of the petition, in the possession of the bankrupt and, at all times after the filing of the petition, in the possession of the trustee. They were never in the possession or control of the respondents. Where the trustee has actual physical possession of property, then the Bankruptcy Court has summary jurisdiction, regardless of the nature of the claim asserted by respondent.

Cline v. *Kaplan*, 323 U. S. 97;

Sampsell v. *Imperial Paper & Color Corp.*, 313 U. S. 215;

Thompson v. *Magnolia Petroleum Co.*, 309 U. S. 478, 481;

Fish v. *East,* (C. A. 10) 114 F. 2d 177;

Irving Trust Co. v. *Weisser Products,* (C. A. 2) 71 F. 2d 681;

In re American Cork Co., (C. A. 2) 54 F. 2d 470;

In re Columbia Shoe, (C A. 2) 289 Fed. 465;

In re Hoey, (C. A. 2) 290 Fed. 116;

Davidson v. *Scofield,* (C. A. 10) 153 F. 2d 7.

Where the Court has summary jurisdiction, it has jurisdiction to determine any and all issues between the trustee and the respondents.

Vought v. *Giffin,* (C. A. 2) 175 F. 2d 186;

Gardner v. *New Jersey,* 329 U. S. 565, 573;

Alexander v. *Hillman,* 296 U. S. 222;

Chase National Bank v. *Lyford,* (C. A. 2) 147 Fed. 273;

National City Bank v. *O'Connell,* (C. A. 2) 155 F. 2d 329;

Columbia Foundry v. *Lochner,* (C. A. 4) 179 F. 2d 630;

In re Nathan, (D. C. Cal.) 98 F. Supp. 686.

The property in question was never in the possession or control of the respondents, but was actually in the possession of the bankrupt up to the time of the filing of the petition. Since the filing of the petition, the property has been in the actual physical possession of the trustee by reason of which the Bankruptcy Court had summary jurisdiction over the property, the parties and the issues involved.

B. The Chattel Mortgage is Void in its Entirety.

There was a lapse of twenty-nine days between the execution of the mortgage on March 16, 1949 and the filing of the same on April 14, 1949. The delay was inadequately explained and, in fact, found by the Referee, the District Court and the Court of Appeals, to be unreasonable, unjustified and unwarranted, rendering it void as against the creditors and the trustee in bankruptcy.

Tooker v. *Siegel-Cooper Co.*, 194 N. Y. 442;

Karst v. *Gane*, 136 N. Y. 316;

Stephens v. *Perrine*, 143 N. Y. 476;

Reynolds v. *Webb*, 166 N. Y. S. 668;

Stitch v. *Pirkl*, 100 Misc. 394, 166 N. Y. S. 440;

Stephens v. *Meriden Britannia*, 13 App. Div. 268, rev'd on other grounds 160 N. Y. 178;

In re Kessler, (D. C. Calif.) 90 F. Supp. 1012;

In re Francino's Grill, (S. D. N. Y.) 26 F. Supp. 856;

In re Coombs, (D. C. Mo.) 37 F. Supp. 495;

General Motors Acceptance Corp. v. *Coller*, (C. C. A. 6) 106 F. 2d 584;

In re Weinstein, (W. D. N. Y.) 40 F. Supp. 798;

In re Pearlman, (E. D. N. Y. 246 Fed. 874.

Where a chattel mortgage is null and void as against the trustee and creditors, the mortgage is void in its entirety.

General Motors Acceptance Corp. v. *Coller, supra;*

City of New York v. *Rassner*, (C. A. 2) 127 F. 2d 703, 707;

Friedman v. *Sterling*, (C. A. 4) 104 F. 2d 837;

In re Urban, (C. A. 7) 136 F. 2d 296;

Truscott Boat & Dock Co., (D. C. Mich.) 92 F. Supp. 430.

A mortgage void as to one creditor is void as to all.

Moore v. *Bay,* 284 U. S. 4, 52 S. Ct. 3;

City of New York v. *Rassner, supra;*

In re Sachs, (C. A. 4) 30 F. 2d 510, 514, 515.

The judgment obtained by Goldblatt against Moraes Construction Co., Inc. in the suit instituted by him in the Supreme Court, Queens County, was a suit solely as against Moraes Construction Co., Inc. Neither Morbar Construction Corp., nor Moraes and Cavanaugh, Inc., the two other mortgagors, nor the creditors of Moraes Construction Co., Inc., nor the trustee in bankruptcy, were ever made parties to the action.

Under such circumstances, the judgment could not be res judicata as against the trustee nor the creditors of the mortgagors.

Stephens v. *Perrine, supra;*

Tooker v. *Siegel-Cooper Co., supra;*

Karst v. *Gane, supra;*

Skilton v. *Codington,* 185 N. Y. 80;

Slote v. *Cascade Holding Corp.,* 276 N. Y. 239.

The trustee, in his proceeding, questioned the validity of the mortgage not in the right, place and stead of the bankrupt, but in the right, place and stead of the creditors, under and by virtue of the provisions of Sections 70c and e of the Bankruptcy Act and 230 of the Lien Law of the State of New York.

Hoffman v. *Cream-O Products* (C. A. 2) 180 F. 2d 649, certiorari denied, 340 U. S. 815;

Empire State Chair Co. v. *Beldock,* (C. A. 2) 140 F. 2d 587, certiorari denied, 322 U. S. 760;

City of New York v. *Rassner, supra;*

In re Sachs, supra;

Friedman v. *Sterling, supra.*

CONCLUSION.

There being no conflict in the decisions and there being no important questions of law herein, the petition for certiorari should be denied.

Respectfully submitted,

MAX SCHWARTZ,
Attorney for Respondent.